A

LATEW BAKUH & ANOR

v.

JOHARI ABDULLAH & ORS

B

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[CIVIL APPEAL NO: 12-9-2009-III]
6 MARCH 2009

C ***CIVIL PROCEDURE:*** *Judgments and orders - Setting aside - Default interlocutory judgment - Whether Sessions Court Judge was functus officio - Whether party intending to set aside judgment acted timeously - Whether there was lengthy delay - Whether application dismissed - Subordinate Courts Rules 1980, O. 28 r. 8, O. 29 r. 14*

D

This was an appeal against the decision of the Sessions Court Judge dismissing the appellants' application to set aside a default interlocutory judgment in respect of liability in a personal injury case. The facts were that the driver of a car and his two

E passengers died during an accident along the Kuching-Sri Aman road. The second respondent, an infant aged four years, survived the accident and sued through his grandfather and next friend. The first respondent was the administrator of the estate of the second respondent's deceased parents. The third respondent was

F the administrator of the estate of the other deceased passenger. The respondents pleaded in the statement of claim that the car driven by the father of the infant swerved and collided into an oncoming lorry because the appellants' car encroached into his path. The first appellant was the permitted driver of the said car

G whereas the second appellant was the registered owner. The respondents filed the writ of summons and statement of claim on 9 March 2005 and the summons was served on both appellants on 17 July 2005. An interlocutory judgment with damages to be assessed was entered against the appellants in their absence on

H 26 December 2006. The judgment was served on the appellants on 2 May 2007. Notice was given to the appellants that the assessment hearing would take place on 14 September 2007. The appellants did not take steps to set aside the judgment in default in respect of liability. The trial to assess damages was eventually

I held on 19 December 2007. However, the appellants did not attend court. Damages were assessed and judgment was pronounced on 7 March 2008 in respect of the respondents' estate and dependency claims. Finally, on 15 October 2008, the

respondents filed a recovery action under s. 96 of the Road Transport Act against the insurers. On 3 November 2008, the applicants filed an application to set aside the default interlocutory judgment dated 26 December 2006. The Sessions Court heard this application and dismissed it on two grounds *ie*, that he was *functus officio* and that there was a lengthy unexplained delay on the part of the appellants in applying to set aside the judgment in default.

Held (dismissing application with costs):

(1) The respondents had obtained a default interlocutory judgment and the appellants applied to set it aside before the same court. If the appellants had filed another application after the refusal of the Sessions Court Judge to set aside the interlocutory judgment, it could be said that the Sessions Court Judge had become *functus officio*. However, the appellants did not do that as they had properly appealed against the said decision to the High Court. Therefore, the question of the Sessions Court Judge being *functus officio* did not arise. (para 7)

(2) Order 28 r. 8 of the Subordinate Court Rules 1980 provides that a default judgment can be set aside if the application complies with O. 29 r. 14 which requires that a party intending to set aside a judgment in default must act timeously in that the application must be made within 30 days of receipt of the said judgment. Here, the interlocutory judgment was served on the appellants on 14 September 2007 but the appellants did not apply to set aside the judgment until 3 November 2008. This was by any reckoning a very lengthy delay as the rules gave the defendant only 30 days to set aside the judgment in default. (para 10)

(3) The delay in not resisting the claim until the trial for assessment was completed and the respondents sought to enforce the judgment was totally unjustified. This was a personal injury action in which the defendant (an infant) of the three deceased persons sought relief. Long delays in these sort of cases would cause untold misery and hardship to the families of the accident victims. Both the appellants and their insurers were aware of the pending suit from the outset yet chose to do nothing until recovery action was initiated. Therefore, extension of time outside the 30 days period under O. 29 r. 14 should not be granted. (paras 10 & 11)

A **(4)** In view of the very lengthy delay in this case right from the time the default interlocutory judgment was served on the appellant to the time the appellants filed in their application to set aside the said judgment for which no acceptable explanation was proferred, the court should not consider the B merits of the application. (para 12)

Case(s) referred to:

Adzmi Ali v. Mohd Isa Kasad [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 SC ***(refd)***

C *Chong Kueng Ying & Ors v. Lovis Lavagna [1971] 2 MLJ 225* ***(refd)***

Ee Kim Kin v. Collector of Land Revenue, Alor Gajah [1967] 2 MLJ 89 ***(refd)***

Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd [2003] 4 CLJ 533 CA ***(refd)***

Pemunya Kapal Dan Orang-Orang Lain Yang Mempunyai Kepentingan D *Dalam Kapal MV "Brihope" v. Emmanuel E Okwuosa & Ors (No 2) [1996] 4 CLJ 476 CA* ***(refd)***

Soon Leong Fatt & Anor v. Kumpulan Lee Hing Sdn Bhd [1999] 1 LNS 350 HC ***(refd)***

Legislation referred to:

E Road Transport Act 1987, s. 96(2)

Rules of the High Court 1980, O. 1A, O. 2 r. 3

Subordinate Court Rules 1980, O. 28 r. 8, O. 29 r. 14, O. 49 rr. 2, 6

F *For the appellant/defendants - Derbe Tang; M/s Chew Jugah Wan Ullok & Co Advocates*

For the respondents/plaintiffs - Shankar Ram; M/s Thomas, Shankar Ram & Co Advocates

Reported by Suhainah Wahiduddin

G

JUDGMENT

Ravinthran Paramaguru JC:

H **[1]** This is an appeal against the decision of the learned Sessions Court judge who dismissed the appellants' application to set aside a default interlocutory judgment in respect of liability in a personal injury case.

I

Preliminary Objection

[2] At the outset of the appeal, counsel for respondent said that the appeal was filed under O. 49 r. 2 instead of O. 49 r. 6 of the Subordinate Court Rules 1980 and should therefore be struck out. Order 49 r. 6 is applicable for appeals from non-trial matters in the lower court. The instant appeal is against the decision of the Sessions Court judge to dismiss an application to set aside a judgment in default. Therefore counsel for respondent is right to submit that the appeal was wrongly filed under O. 49 r. 2 which is in respect of decisions after a trial. He cited some authorities to argue that the appeal should be struck out. The failure of the appellant to proceed under the correct rule in this appeal is, in my opinion, a matter of mere technical non-compliance which did not cause any miscarriage of justice. It also did not cause a lengthy delay or disruption to the appeal process. The delay in filing the Appeal Record was only two weeks. The Notice of Appeal was filed within time. All the relevant documents that are required under O. 49 r. 6 were properly included in the Record of Appeal in this case. The cases cited by counsel for respondent were decided before the insertion of O. 1A and O. 2 r. 3 to the Rules of the High Court 1980. These rules provide that the court should have regard to substantial justice rather than to technical non-compliance unless they cause a miscarriage of justice. It is to some extent a reaffirmation of the epithet that the rules of procedure should be the handmaiden and not the master (per Ismail Khan in *Ee Kim Kin v. Collector of Land Revenue, Alor Gajah* [1967] 2 MLJ 89). I shall therefore dismiss this preliminary objection.

Background Facts Of Claim

[3] The brief facts of the claim as pleaded in the statement of claim of the three appellants are as follows. On 11 October 2004, the driver of a car bearing registration number QKT 7180 and his two passengers died during an accident along the Kuching - Sri Aman road at KM78.6. The 2nd respondent, an infant aged four years old, survived the accident and he sued through his grandfather and next friend. The 1st respondent is the administrator of the estate of the 2nd respondent's parents who succumbed to their injuries after the tragic accident. The 3rd respondent is the administrator of the estate of the other deceased passenger. The respondents pleaded in the statement of

claim that the car driven by the father of the infant swerved and collided into an oncoming lorry because the appellants' car encroached into his path. The 1st appellant is the permitted driver of the said car whereas the 2nd appellant is the registered owner.

[4] The respondents filed the writ of summons and statement of claim on 9 March 2005. The summons was served on both appellants on 17 July 2005. Prior to the filing of the action, the respondents' counsel served a statutory notice under s. 96 of the Road Transport Act on the insurers of the appellants. The insurers confirmed the insurance coverage and replied that they were in the midst of negotiations with the third party's solicitors. The case was mentioned six times in open court. At the earlier mention dates, the appellants were represented by solicitors who subsequently withdrew themselves. After service of notice of hearing for a fresh mention date, an interlocutory judgment with damages to be assessed was entered against the appellants in their absence on 26 December 2006. The judgment was served on the appellants on 2 May 2007. Notice was given to the appellants that the assessment hearing would take place on 14 September 2007. Neither the appellants nor the insurers took steps to set aside the judgment in default in respect of liability. The trial to assess damages was eventually held on 19 December 2007. The appellants were notified of this date *vide* respondents' letter (J14). However, the appellants did not attend court. Damages were assessed and judgment was pronounced on 7 March 2008 in respect of the respondents' estate and dependency claims. This judgment was served on the 1st and 2nd appellant on 4 and 5 May 2008. At the hearing to tax costs on 27 August 2008, the appellants did not attend court either although they were notified of the hearing date. Finally on 15 October 2008, the respondents filed a recovery action under s. 96 of the Road Transport Act against the insurers. The appellants appeared to have woken up after this as on 3 November 2008, they filed an application to set aside the default interlocutory judgment dated 26 December 2006. The Sessions Court heard this application and dismissed it with costs on 30 December 2008. The learned Sessions Court judge delivered his grounds of decision on the same day.

[5] The Sessions Court judge dismissed the application on two grounds, ie, on the ground that he was *functus officio* and on the ground that there was a lengthy unexplained delay on the part of the appellants in applying to set aside the judgment in default.

Functus Officio

[6] Before me, counsel for the appellants attacked the conclusion of the Sessions Court judge that he was *functus officio* and therefore he had no power to set aside the judgment. The learned Sessions Court judge held that since the hearing of assessment of damages was completed, the judgment had become "final" and cannot be set aside. He further opined that the judgment could only be set aside by way of appeal and not by way of an application to set it aside before the same court. In not so many words, he said that the matter had been heard on its merits. The authorities he cited are *Adzmi Ali v. Mohd Isa Kasad* [1987] 1 CLJ 445; [1987] CLJ (Rep) 37, *Pemunya Kapal Dan Orang-Orang Lain Yang Mempunyai Kepentingan Dalam Kapal MV "Brihope" v. Emmanuel E Okwuosa & Ors (No 2)* [1996] 4 CLJ 476, and *Soon Leong Fatt & Anor v. Kumpulan Lee Hing Sdn Bhd* [1999] 1 LNS 350. In *Adzmi Ali v. Mohd Isa Kasad*, the defendant had applied to set aside a default interlocutory judgment for damages to be assessed. The High Court dismissed this application. The defendant did not appeal against this decision to the Supreme Court. Instead, after damages were assessed, he applied again by notice of motion to set aside the default interlocutory judgment and the judgment awarding damages before the same court. The High Court judge ruled that he was *functus officio* as he had earlier dismissed the application to set aside the default judgment by way of summons in chambers. It was in this context that the Supreme Court ruled that:

> In our opinion, when an aggrieved party was dissatisfied with the decision of the learned judge to set aside a default judgment final judgment under O. 13 r. 1(1) or an interlocutory judgment with damages to be assessed under O. 13 r. 21 the proper procedure to be followed was by way of appeal to the Supreme Court subject to the provisions of s. 68(1)(a) of the Courts of Judicature Act 1964. The authority for this view is *Evans v. Bartlam (supra)*.

[7] In the instant case, the respondents had obtained a default interlocutory judgment and the appellants applied to set it aside before the same court. If the appellants had filed another application after the refusal of the Sessions Court judge to set aside the interlocutory judgment, it can be said that the Sessions Court judge had become *functus officio*. However, the appellants did not do that as they had properly appealed against the said

A decision to the High Court. Therefore, the question of the Sessions Court judge being *functus officio* does not arise. The case of *Pemunya Kapal Dan Orang-Orang Lain Yang Mempunyai Kepentingan Dalam Kapal MV "Brihope" v. Emmanuel E Okwuosa & Ors (No 2)* [1996] 4 CLJ 476 where it was held that the judge of
B first instance was *functus officio* is not applicable either as the judgment in question was not a default judgment. This is clear from a reading of the whole judgment of the Court of Appeal. The learned Sessions Court judge also relied on the case of *Soon Leong Fatt & Anor v. Kumpulan Lee Hing Sdn Bhd* [1999] 1 LNS
C 350 to conclude that the instant case had been heard on its merits. The High Court in that case in ruling that it was proper to proceed by way of appeal instead of by an application to set aside a judgment obtained in the absence of the defendant said as follows:

D

> It is apparent from the notes of proceedings that notwithstanding the absence of the appellants or their Counsel, the Order of the Sessions Court Judge was made after he had been referred to the application, the affidavit in support, the exhibits and also the defence. The Sessions Court Judge had therefore entered into and
E thereafter made an adjudication on the merits of the application. The authorities cited by Counsel for the appellants show that if there is an adjudication on the merits, the proper course a dissatisfied party should take is to appeal and not apply to set aside such decision, the rationale being that the Court has no
F jurisdiction to re-hear the matter.

[8] I am of the view that the learned Sessions Court judge is wrong to rely on this case to conclude that the instant case had been heard on its merits. In the above cited case, the default
G judgment that was entered was in respect of an application for summary judgment. The plaintiff had filed the statement of claim and affidavit in support. The defendants had also filed their statement of defence and an affidavit to oppose the application. On the day of the hearing, the counsel for the defendants was
H absent. Nonetheless, the Sessions Court judge perused the pleadings and affidavits before giving his decision. Even if the counsel for defendant was present, he would have conducted a similar exercise to make a determination on the application in question except that he may have had the benefit of a legal
I argument. In the instant case, there was no summary judgment application that was pending before the court. The appellants had not even filed their statement of defence. Only the summons and

statement of claim was before the court. Similarly in the other cases cited by the learned Sessions Court judge, the court had considered affidavit evidence filed by the parties before pronouncing judgment. Therefore, in the instant case, one is hard put to conclude that the Sessions Court judge heard the case on its merits when the default interlocutory judgment for damages was pronounced on 26 December 2006. Order 28 r. 8 of the Subordinate Court Rules 1980 provides as follows:

> 8. Judgment, etc., given in absence of party may be set aside. (O. 35 r. 2).
>
> (1) **Any** judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just.
>
> (2) An application under this rule shall be subject to Order 29, rule 14.
>
> (emphasis added)

[9] The rule does not make a distinction between an interlocutory judgment for damages to be assessed and a judgment for a liquidated sum. It says "any" judgment. In *Chong Kueng Ying & Ors v. Lovis Lavagna* [1971] 2 MLJ 225, that was cited by learned counsel for appellant, the court set aside a default interlocutory judgment in personal injury case. In conclusion, I am of the view that the learned Sessions Court judge was wrong when he ruled that he was *functus officio* as regards the application to set aside the judgment in default dated 26 December 2006. I shall now consider the other ground that was relied on by the Sessions Court judge.

Non Appearance And Delay

[10] In the instant case, the insurers had been served with a statutory notice under s. 96(2) of the Road Transport Act 1987 prior to the filing of the action. The appellants were served with the summons and statement of claim. However they allowed judgment to be entered by way of non-appearance. In the affidavit in support of the application, the 1st appellant admitted receiving the demand letter and the summons from the plaintiffs' counsel. They also admitted being involved in a "self accident" at the same place and time as claimed by the respondents. The 1st appellant, however, said that she and the 2nd appellant did not attend court

because a policeman advised them that they had nothing to do with the collision involving the 2nd respondent and the three deceased persons. The reason given by the appellants for not attending court is not acceptable as the summons served on them required them to attend court. Order 28 r. 8 provides that a default judgment can be set aside if the application complies with O. 29 r. 14. Order 29 r. 14 requires that a party intending to set aside a judgment in default must act timeously in that the application must be made within 30 days of receipt of the said judgment. In this case, the interlocutory judgment was served on the appellants on 14 September 2007 but the appellants did not apply to set aside the judgment until 3 November 2008. This is by any reckoning a very lengthy delay as the rules gave the defendant only 30 days to set aside the judgment in default. The learned Sessions Court judge considered the reason for the delay as "a lame excuse". The 1st appellant said that only when she received a phone call from her solicitors in October of 2008 that she realised that judgment in default had been entered against her on 26 December 2006. However, in her affidavit she admitted receiving the summons and other documents including letters about court mentioned dates from the respondents' solicitors. Interestingly, she did not deny being served with the judgment in default in her affidavit. The judgment was served on her and the 2nd appellant personally by the process server of the respondents' counsel as evidenced by the affidavit of service (exhibited as J13 in the 1st respondent's affidavit in opposition). In the premises, she had no reason to be surprised that judgment had been entered against her and the 2nd appellant. Therefore, the finding of the Sessions Court judge that the appellants' reason for the delay was a lame excuse cannot be faulted. The other reason given by the 1st appellant is that the summons and statement of claim were not served on her insurers. It is trite law that the insurers are not a party in a personal injury claim until the plaintiff seeks to enforce the judgment under s. 96(2) of the Road Transport Act 1987 by way of a recovery action. There was no legal obligation to serve the summons on anyone except the appellants herein. Even so, the respondents' counsel had diligently notified the insurers at the outset by serving the statutory notice prior to the filing of the action in 2005. Counsel for the respondents had painstakingly calculated that 1,343 days had elapsed from the time of service of the statutory notice until the filing of the instant application. Therefore, there is no reason for surprise on the part of the appellants or the insurers. The delay

in not resisting the claim until the trial for assessment was completed and the respondents sought to enforce the judgment is totally unjustified. This is a personal injury action in which the dependants (who are infants) of the three deceased persons sought relief. It is common knowledge that long delays in this sort of cases will cause untold misery and hardship to the families of the accident victims. Therefore the appellants' argument that no prejudice that cannot be compensated by costs will be occasioned by the lengthy delay cannot be countenanced by the court.

Decision

[11] Learned counsel for the appellants submitted that the appellants had merits in their defence. The 1st appellant deposed that she was involved in a self accident as she swerved her car from left to right side of the road and hit a pole. She said her path was clear at that time and she did not see any other car. Learned counsel for appellants argued that the merit of the defence must be considered. I agree with her that the court has a discretion to set aside a judgment in default in spite of delay. However, the delay must not be inordinate and the explanation for it must be reasonable. This is not a case of an irregular judgment. It is a regular judgment for damages to be assessed and the court had proceeded to complete the trial of assessment of damages. In the cases cited by counsel for appellants, a perusal of the facts showed that the court had exercised its discretion to set aside the judgment in default because the delay was not inordinate and the explanation for it was acceptable. In the instant case, both appellants and their insurers were aware of the pending suit from the outset and yet chose to do nothing until recovery action was initiated. Therefore I am of the opinion that extension of time outside the 30 days period under O. 29 r. 14 should not be granted (see the Court of Appeal case of *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* [2003] 4 CLJ 533). In that case, Nik Hashim JCA said as follows in refusing to extend time to set aside a default judgment:

> From the record, the JID was not irregular in any way. However, the appellants' application did not comply with O. 42 r. 13 of the Rules of the High Court 1980 which requires that a party intending to set aside a judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the judgment by him. In the present case the 1st and 3rd appellants were two months outside

A the time allowed whereas the 2nd appellant was seven months. Further, there was no explanation whatsoever from the appellants for their delay in approaching the court and that they had not prayed for extension of time to make their applications. In these circumstances, there was clearly no need for the merits of the
B appellants' application to be considered and in fact they should be dismissed in limine (See *Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 CLJ 335; *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; *Abdul Latif bin Mohd Ibrahim v. International Factors Leasing Pte Ltd* [2001] 2 CLJ 140).

C

[12] In conclusion, in view of the very lengthy delay in this case right from the time the default interlocutory judgment was served on the appellants (2 May 2007) to the time the appellants filed in their application to set aside the said judgment (3 November
D 2008) for which no acceptable explanation was proffered, I agree with the counsel for respondents that the court should not consider the merits of the application.

[13] The application is dismissed with costs

E

F

G

H

I